TAN PENG HENG v. REGINA.

[A. Cr. J. (Brown, Ag. C.J.) November 11, 1953]

[Singapore — Magistrate's Appeal No. 161 of 1953]

Dangerous drugs — Possession — Onus of proof — Knowledge.

The appellant was caught by a detective while he was carrying a parcel containing raw opium from the boot of the car he was driving to a certain house. He stated that the parcel was given to him by a friend to deliver and that he did not know the contents thereof. His friend was called to give evidence in support. The detective however stated that the appellant when caught tried to get away and that the parcel smelt like raw opium. The prosecution relied on section 37(d) of the Dangerous Drugs Ordinance and submitted that the burden of proof shifted to the appellant to prove that he did not know what was in the parcel.

Held: before the burden of proof had shifted from the prosecution to the defence the onus was upon the prosecution to prove to the satisfaction of the Court that the appellant knew that the raw opium was in the parcel. From the evidence as a whole it is probable that the appellant was an innocent carrier and was unaware of the contents.

[Editorial Note: Caution should be taken when construing s. 37(d) of the Federation Dangerous Drugs Ordinance, 1952, which is different from the wording of the Singapore Ordinance — See Public Prosecutor v. Ong Chang Sow (1954) M.L.J. 82].

Cases referred to:—

(1) *Ho Seng Seng v. R.* (1951) M.L.J. 225.

(2) *Toh Ah Loh & Mak Thim v. R.* (1949) M.L.J. 54.

(3) *Sim Chwee Chua v. R.* (1951) M.L.J. 227.

MAGISTRATE'S APPEAL.

F. R. N. H. Massey for the appellant.

G. S. Hill (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Brown, Ag. C.J.: — The appellant was convicted of being in possession of 24 lbs of raw opium. The prosecution case depended upon the evidence of a Detective employed in the Narcotics Branch who was keeping watch on a house, No. 402 Orchard Road. He was in a lane at the back of the house; and the appellant was seen to drive a car into the lane, open the boot, take out a brown paper parcel, and walk to the back door of No. 402 carrying the parcel. As he was opening the door the detective stopped him. In his evidence in chief the detective said: "he tried to get away but failed". He further said "I smelt the bundle and it smelt like raw opium." These two pieces of evidence are important because it was contended by the respondent that the case for the prosecution depended upon them, and it will be necessary to consider these two pieces of evidence in detail.

The case for the defence was that the appellant was given the parcel at the Empress Hotel to take to 402 Orchard Road by a man named Ah Hoat, who told him that it contained medicine. His story was corroborated by Ah Hoat who was called as witness for the defence. This man admitted that he knew full well what was in the parcel but confirmed that he had told the appellant that it contained medicine. The appellant's counsel, at the close of the evidence sought to invoke the decision in *Ho Seng Seng v. Rex*[1] as authority for the proposition that, upon the facts in this case, there was no proof that the appellant knew what was in the parcel. The learned District Judge was quite correct in holding that that case had no application for the purpose for which counsel contended. The question in that case was whether the burden of proof had shifted from the prosecution to the defence under section 37(d) of the Ordinance. In the present case it was never sought to invoke the provisions of section 37(d). At the trial from the beginning to end the burden of proof was upon the prosecution and it was never suggested otherwise in the Court below. The learned District Judge plainly formed an adverse opinion of the appellant and his witness and if there was evidence upon which he could be satisfied that the appellant knew what was in the parcel it was open to him to convict. The question is whether there was such evidence.

The two pieces of evidence relied upon are (a) the smell and (b) the struggle. With regard to the first, the parcel has been produced in Court at the hearing of the appeal and I can only say that no one would now be conscious of any smell from merely carrying the parcel. It was suggested that the smell might have been stronger when the appellant was arrested. But there is nothing in the detective's evidence to suggest that the smell was then strong enough to be noticed by anyone carrying the parcel. All that he says is: "I smelt it and it smelt like raw opium". I take that to mean that he put his nose to the parcel, and being a detective in the Narcotic Branch he was able to recognise the smell as that of raw opium. But even if the smell had been strong enough at the time for the appellant to be conscious of it there is no reason to suppose that he would have recognised what it was. The evidence regarding the smell would by itself have been quite inadequate to support this conviction.

But there is the further evidence that he tried to get away. If that was substantiated there might be ground for saying that guilty knowledge could be inferred from his conduct. But an examination of the whole of the detective's evidence, in my opinion, fails to substantiate the fact that he tried to get away In his evidence in chief this witness said: "He tried to get away but failed". But when the following

cross-examination is considered this must be open to grave doubt:—

Q. Accused held the parcel in his right hand throughout?
A. Yes.

Q. Is accused bigger than you?
A. Yes.

Q. He never dropped it?
A. No.

Q. The struggle was not violent? (No answer).

Q. How did you hold the accused?
A. By his belt.

Q. With two hands?
A. One hand.

Q. Did you hold him with one hand the whole time?
A. Yes.

Q. What did you do with the other hand?
A. Nothing.

I find it very difficult, upon the evidence, to believe that the appellant tried to run away. Moreover, he at once told the detective how he had come by this parcel. He said that he had got it from Ah Hoat, and he said that Ah Hoat was at the Empress Hotel. And he asked the detective to go to the Empress Hotel — an admission which appears from the record to have been extracted from the detective with some difficulty because at first he refused to answer.

But in arguing this appeal Mr. Hill, on behalf of the respondent, says that when it was proved that the appellant was carrying the parcel the burden of proof shifted, by virtue of the provisions of section 37(d), and the burden was then on the appellant to prove that he did not know what was in it. He referred to a passage from the decision of the Court of Criminal Appeal in *Toh Ah Loh and Mak Thim v. Rex*[2] where they laid down three characteristics which were necessary to constitute criminal possession. The third characteristic (which I quoted from their judgment) was: "(c) he must be conscious of the possession of the thing." But if that passage is read in conjunction with the previous paragraph of the judgment in *Ho Seng Seng's case*[1] it is clear that the decision in that case was that before the burden of proof shifted:—

"the onus was upon the prosecution to prove to the satisfaction of the Court that the appellant knew that a dangerous drug was in the basket. If they had proved that, then section 37 (d) would have raised the presumption that the appellant was in possession of it and knew that it was opium."

The head-note to that case correctly records the decision. But it is necessary again to stress that *Ho Seng Seng's case*[1] relates solely to the shifting of the burden of proof under section 37(d). As was pointed out in the unreported Magistrate's appeal No. 57 of 1949, which is referred to in *Ho Seng Seng case*[1]: "in ordinary cases the circumstances are such that the Court can, in the absence of evidence to the contrary infer knowledge". The case of *Sim Chwee Chua v. Rex*[3] affords an example of a Court properly inferring knowledge from the circumstances. No question arose in that case of invoking section 37(d). The present case might have afforded a similar example if the two pieces of evidence which are relied upon had been stronger than they were. But from the record of the cross-examination of the detective I am not satisfied that the appellant tried to run away. And the fact that he immediately told the detective (in answer to a question) about Ah Hoat and asked him to go to the Empress Hotel — a fact to which no allusion is made in the grounds of decision — in my opinion renders the defence story much less "fantastic" than seems to have been thought. And upon the view which I take of the evidence as a whole it does not exclude the possibility that the appellant may have been an innocent carrier who was not aware of the contents of the parcel.

The appeal must, therefore, be allowed and the conviction quashed.

Appeal allowed.

Solicitors for the appellant: *Allen & Gledhill.*

CHEN PANG KWEE v. MERU TIN LIMITED.

[C. A. (Mathew, C.J., Pretheroe and Buhagiar, JJ.) November 23, 1953]

[Ipoh — F.M. Civil Appeal No. 55 of 1952]

Courts Ordinance 1948 s. 37(1)(b) — Application of — Consent of parties to order obtained in lower court — Competence of the Court of Appeal thereafter.

This was a motion for leave to appeal to Her Majesty in Council from a decision of the Court of Appeal which declared itself incompetent to hear the appeal and thereby dismissed it.

At the hearing of the appeal the respondents (defendant Company) took a preliminary objection to the competency of the appeal on the ground that the decree of the Court below appealed against was made by consent and that there was embodied an undertaking not to appeal.

Held: section 37(1)(b) of the Courts Ordinance, 1948 expressly provides that no appeal shall be brought to the Court of Appeal where the judgment or order is made by consent of the parties, and therefore there were no merits whatsoever in the application.

Case referred to:—

(1) *Robert Murray Burgess v. Andrew Morton* (1896) A.C. 136.